

ISSUED APRIL 14, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC.	)	AB-7122
dba Circle K	)	
24051 John F. Kennedy Drive	)	File: 20-189087
Moreno Valley, California 92388,	)	Reg: 97041341
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 1999
	)	Los Angeles, CA
	)	

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Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its on-sale beer and wine license for 25 days, with 10 days thereof stayed for a probationary period of one year, for appellant's clerk, Albert Urban, having sold a six-pack of Budweiser beer to Brian Weaver, who was acting in the role of a decoy in a decoy operation conducted by the Riverside County Sheriff's Department, such sale being contrary to the universal and generic public welfare and morals

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<sup>1</sup>The decision of the Department, dated April 23, 1998, is set forth in the appendix.

provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 2, 1988. Thereafter, the Department instituted an accusation against appellant charging the sale described above. Following an administrative hearing which was held on February 3, 1998, the Department entered the decision from which the present appeal is taken. At that hearing, testimony was presented by Ronald Heim, the police officer directing the decoy operation; by Brian Weaver, the decoy; and by Luis Campos, a district manager for Tosco Corporation. Heim and Weaver described the events which occurred in connection with the sale of the beer, while Campos testified about Circle K policies and procedures, including the fact that prior to March 1997, it was company policy for sales clerks to ask for identification from any prospective purchaser who appeared to be under the age of 21. Beginning in March 1997, that policy was changed, so that identification is now required from anyone appearing to be under the age of 30. The transaction involved in this case occurred on December 20, 1996, and Weaver was not asked his age or for identification which would show his age.

Appellant has filed a timely notice of appeal. In its appeal, appellant raises

the following issues: (1) the Department improperly construed Rule 141 (b)(2); and (2) the Department considered disciplinary actions against a prior licensee in deciding the penalty.<sup>2</sup>

## DISCUSSION

This is one of several cases in which appellants contend that the Department has misapplied Rule 141(b)(2). All were initially decided by the same Administrative Law Judge (ALJ), whose proposed decisions were adopted by the Department.

Appellant contends that Rule 141(b)(2) requires a "spectrum of indicia of age" to be considered, and that the Department erred in considering only the physical appearance of the minor.

Rule 141(b)(2) mandates that "the decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances at the time of the alleged offense." The term "appearance" is not otherwise defined in the rule.

Appellant's attack on the decision of the Department is directed at the finding that:

"[The decoy] ... is a youthful looking male whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages"

Appellant argues that the rule does not limit appearance to physical appearance, and, in addition, requires that the decoy's appearance be that generally

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<sup>2</sup> In light of our disposition of the Rule 141 issue, we do not address this contention.

expected of a person under 21 years of age under the circumstances presented to the seller. The Department's use of the term "physical appearance", appellant contends, is a departure from, and violation of Rule 141(b)(2), because the rule uses only the term "appearance." While It is true that the ALJ and the Department employ words and terms that are not expressly in the rule, the issue is not so simplistic.

Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what the ALJ did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the

age of 21 years.

Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

#### ORDER

The decision of the Department is reversed.<sup>3</sup>

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup> This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.